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June 16, 2010

VIA EMAIL

Sharon Gillett, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Beehive Telephone Companies
Amended Petition for Declaratory Ruling
WC Docket No. 10-36

Dear Ms. Gillett:

On February 2, 2010, the Beehive Telephone Companies ("Beehive") filed a petition for declaratory rulings that: (1) the Commission will not entertain a formal complaint by Beehive against Sprint Communications Company, L.P. ("Sprint") to recover access charges allegedly due under NECA's Tariff F.C.C. No. 5 ("NECA 5"); (2) only a claim for the recovery of damages caused by a carrier's violation of the Communications Act of 1934, as amended ("Act") can trigger an election of remedies under § 207 of the Act; (3) Beehive's informal complaint in File No. EB-08-MDIC-0029 did not make a claim for the recovery of damages for which Sprint Nextel Corporation ("Sprint Nextel") was liable under § 206 of the Act; (4) Sprint's failure to pay tariffed charges does not constitute a violation of law for which it is liable for damages under § 206; and (5) neither Beehive's informal complaint against Sprint Nextel nor its complaint against Sprint in the United States District Court for the District of Utah ("Court") in Case No. 2:08-cv-00380 implicated an election of remedies under § 207.

Beehive sought declaratory relief in order to remove the Court's uncertainty, and perhaps that of the United States Court of Appeals for the Tenth Circuit, as to the Commission's jurisdiction over complaints by local exchange carriers ("LECs") to recover unpaid tariffed access charges from interexchange carriers. Beehive asked the Commission to expedite the issuance of the rulings because of the running of the two-year statute of limitations on Beehive's claims to recover interstate access charges due it from Sprint under NECA 5. Beehive urged the

Commission to act promptly so that Beehive could pursue two separate collection suits against Sprint in the Court for unpaid NECA 5 charges. The first would be to collect charges due from Sprint for access service rendered between August 21, 2007 and February 20, 2008. The second suit in Case No. 2:10-cv-00052 is for charges billed Sprint for access service rendered between February 21, 2008 and December 11, 2009. Attachment 1 hereto is a table that distinguishes Beehive's informal complaint against Sprint Nextel from its two collection actions against Sprint.

Beehive's paramount interest in expedition prompted it to amend its petition for declaratory rulings on March 13, 2010. It asked the Bureau for a letter setting forth four seemingly noncontroversial rulings that: (1) the Commission dismisses complaints by LECs that either (a) seek the recovery of unpaid access charges that are allegedly due under the terms of a federal tariff, or (b) purport to allege a violation of § 201(b) of the Act, but state an action for recovery of unpaid access charges allegedly due under the terms of a federal tariff; (2) the Commission cannot dismiss a complaint under § 208(a) of the Act because of the absence of direct damage to the complainant; (3) Beehive's informal complaint did not include either (a) an allegation that it was damaged by any conduct for which liability is imposed on carriers under § 206, or (b) a claim for the recovery of damages sustained by such conduct; and, (4) the informal complaint included the statement that Beehive was not (a) alleging damages or (b) seeking the recovery of damages. Beehive hoped that by simplifying its request it could obtain abbreviated rulings in relatively short order. In light of the motion to dismiss that Sprint filed with the Court this week, Beehive renews its request for expedited consideration.

Attachment 2 is the memorandum that Sprint submitted to the Court in support of its motion to dismiss Beehive's second collection suit. Sprint contends that the Court's ruling that the filing of Beehive's informal complaint against Sprint Nextel constituted an election of remedies under § 207 that barred Beehive's first suit against Sprint for charges for service rendered through February 20, 2008 also bars Beehive second suit to collect charges for service rendered after February 20, 2008. In effect, Sprint contends that the filing of Beehive's informal complaint for a declaratory ruling that Sprint Nextel violated § 201(b) by withholding payment of access charges without justification after each of its nine billing disputes had been denied by Beehive in accordance with NECA 5 constitutes an election of remedies with respect to claims against Sprint to recover unpaid access charges that were unbilled at the time of the informal complaint and unrelated to the alleged unlawful conduct of Sprint Nextel.

Beehive will not address the merits of Sprint's arguments as to the preclusive effect of the Court's prior ruling on the § 207 election-of-remedies. It suffices to note that the Court did not decide whether § 207 could bar a claim for the recovery of unpaid charges that was never presented to the Commission in any proceeding. The significant point is that Sprint's new motion to dismiss has unquestionably created a controversy before the Court as to whether Beehive's informal complaint against Sprint Nextel can constitute a § 207 election of remedies with respect to Beehive's pending collection suit against Sprint. If promptly issued, the Bureau's

declaratory rulings should conduce to the termination of the controversy before the Court and allow Beehive to pursue its current collection suit in the proper forum.

Beehive's memorandum opposing Sprint's motion to dismiss must be filed on or before July 19, 2010. The Bureau is respectfully requested to issue the requested rulings on the § 207 election-of-remedies issue prior to Beehive's filing deadline.

Please contact me should you have any questions with regard to this matter or if I can render any assistance.

Very truly yours,

Russell D. Lukas

cc: Marcus Maher
Lynne Engledow
Charles W. McKee
Michael B. Fingerhut
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Jeffry H. Smith
Raymond A. Hendershot
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# ATTACHMENT 1

| | INFORMAL COMPLAINT<br>FILE NO. EB-08-MDIC-0029 | COMPLAINT<br>CASE NO. 2:08-CV-00380 | COMPLAINT<br>CASE NO. 2:10-CV-00052 |
|---|---|---|---|
| Nature | Informal request for declaratory rulings | Action at law for the recovery of interstate access charges under NECA 5 | Action at law for the recovery of interstate access charges under NECA 5 |
| Defendant | Sprint Nextel | Sprint | Sprint |
| Filed | Mar. 21, 2008 | May 13, 2008 | Jan. 25, 2010 |
| Relief | Declaratory rulings that Sprint Nextel violated § 201(b) of the Act and was bound by NECA 5 § 2.1.4 | Judgment in the amount of $929,626 plus interest, late fees, and attorneys fees | Judgment in the amount of $2,016,276.95 plus interest, late fees, and attorneys fees |
| Jurisdiction | 47 U.S.C. § 208(a) and 5 U.S.C. § 554(e) | 28 U.S.C. § 1331 | 28 U.S.C. § 1331 |
| Damages | No | No | No |
| First Accrued | Jan. 19, 2008 | Jan. 19, 2008 | Mar. 1, 2008 |
| Statute of Limitations | None | 47 U.S.C. § 415(a) | 47 U.S.C. § 415(a) |
| Limitations Period | None | Two years | Two years |
| Issues | (1) Whether Sprint Nextel violated § 201(b) of the Act by engaging in unreasonable self-help practices beginning with its decision in October 2007 to withhold payment of Beehive's access charges indefinitely until "traffic pumping" allegations against other LECs are resolved in court<br><br>(2) Whether Sprint Nextel was bound under § 2.4.1 of NECA 5 to pay the disputed charges once Beehive denied the billing disputes | Whether Beehive operated and provided service to Sprint under NECA 5 | Whether Beehive operated and provided service to Sprint under NECA 5 |
| Violation | 47 U.S.C. § 201(b) | None | None |
| Time Period | Oct. 8, 2007 through January 18, 2008 | Aug. 21, 2007 through Feb. 20, 2008 | Feb. 21, 2008 through Dec. 11, 2009 |
| Conduct | Sprint Nextel's decision to withhold payment | Beehive's provision of access service | Beehive's provision of access service |

# ATTACHMENT 2

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Attorneys for Sprint Communications Company, L.P.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

| | |
|---|---|
| BEEHIVE TELEPHONE CO., INC., a Utah corporation, and BEEHIVE TELEPHONE CO. OF NEVADA, INC., a Nevada corporation,<br><br>Plaintiffs,<br><br>v.<br><br>SPRINT COMMUNICATIONS COMPANY L.P., a Delaware limited partnership,<br><br>Defendant, | **AMENDED MEMORANDUM IN SUPPORT OF SPRINT'S MOTION TO DISMISS COMPLAINT**<br><br>Case No. 2:10-cv-00052<br><br>Magistrate Judge David Nuffer |

*Defendant Sprint Communications Company, L.P. ("Sprint") submits this* Amended Memorandum In Support Of Sprint's Motion To Dismiss Complaint, *which contains a revised*

*Exhibit B, a portion of which was missing from Sprint's initial supporting memorandum, and corrects certain references to the Court and pinpoint citations to referenced documents.*

Beehive's Complaint in the above-captioned case should be dismissed for the same reason that the Court already dismissed Beehive's prior complaint in the parallel case *Beehive Telephone Co., Inc. v. Sprint Communications Co., L.P.*, No. 08-cv-380 (D. Utah): it is barred by Section 207 of the Communications Act (47 U.S.C. § 207). *See* Oct. 13, 2009 Memorandum Opinion and Order, No. 08-cv-380 (Doc. #50) ("Dismissal Order"). The Court has already determined that Beehive could not pursue its prior complaint in court since Beehive had previously filed a complaint on the same issue at the FCC. There is no difference in its new Complaint filed in this separate action that could warrant a different result. Nor has there been any change in circumstances. Beehive's new Complaint here is simply an effort to obtain reconsideration of the Court's dismissal decision in No. 08-380 – more than seven months after dismissal – based on an argument Beehive never previously asserted. That attempt is barred under standard principles of issue preclusion.

Beehive's attempt is particularly surprising because the Court previously rejected Beehive's motion to reconsider the dismissal decision and its motion for leave to amend its claims. *See* Jan. 20, 2010 Order, No. 08-380 (Doc. #86) ("Reconsideration Decision"). One reason the Court rejected Beehive's motion to reconsider is that it was based in part on arguments that Beehive could have, but did not, make in responding to Sprint's motion to dismiss. Yet Beehive has now filed a new Complaint that is predicated on an entirely new argument as to why the Court was wrong – an argument that Beehive failed to make not only in

responding to Sprint's motion to dismiss but also in motions for leave to amend and for reconsideration.

Re-filing of its complaint does not exempt Beehive from the Court's holding that Beehive cannot pursue its Complaint in this court. That issue has already been decided against Beehive.

**BACKGROUND**

On May 13, 2008, Beehive Telephone Co. Inc. and Beehive Telephone Co. of Nevada, Inc. (collectively, "Beehive") filed a complaint against Sprint based on a billing dispute. Beehive claimed that Sprint owed it money for charges that Beehive claimed to have billed pursuant to its tariff but that Sprint believed were inconsistent with the tariff. Beehive's complaint encompassed the time period from when Sprint first began withholding disputed charges up until the time of any ultimate disposition of its claims. In particular, Beehive's complaint requested an award of damages "in an amount no less than $929,626.31 . . . and such ongoing amounts that may come due for services received by Sprint pursuant to [the tariff] NECA 5 from and *after the date this action is filed.*" Complaint, No. 08-cv-380 (Doc. #1) at 5 (emphasis added).

Sprint answered and filed counterclaims and then, on July 31, 2009, moved to dismiss Beehive's claim for lack of subject matter jurisdiction. Sprint argued that Section 207 of the Communications Act barred Beehive from proceeding in court because Beehive had previously filed an informal complaint at the FCC on the same issue. In that FCC complaint, Beehive had "requested that the FCC investigate Sprint's practice of refusing to pay Beehive's billed access charges," Dismissal Order at 2, and had asked for a declaration "that Sprint is obligated to pay Beehive's billed access charges and late payment penalties." Beehive March 21, 2008 FCC

Informal Complaint, attached hereto as Exhibit A, at 1. "[T]he FCC entertained Beehive's informal complaint, but made no ruling," as the Court later explained. Dismissal Order at 2. "Instead, the FCC recommended no further action and notified Beehive that it was permitted to file a formal complaint if unsatisfied by the FCC's disposition of the informal complaint." *Id.* at 2-3. Beehive chose not to file such a formal complaint at the FCC. Instead, it continued to pursue its court case.

The Court granted Sprint's motion to dismiss Beehive's court case. It concluded that Beehive's FCC and court complaints were "based on the same issues, Sprint's refusal to pay access service charges," and that Beehive's claim was therefore barred by 47 U.S.C. § 207, which provides that anyone "claiming to be damaged by any common carrier" may either complain to the FCC or bring suit for the recovery of damages in court but not both. The Court's dismissal was without prejudice to Beehive's ability to file a formal complaint on this issue at the FCC; it just could not pursue its claims in court. When Beehive filed its informal complaint at the FCC, it elected its forum.

Rather than pursuing its complaint at the FCC, however, Beehive made two attempts to reinstate its claims in court. First, Beehive filed a motion to amend its complaint to add diversity as an "'additional ground' for subject-matter jurisdiction," arguing that somehow would eliminate the Section 207 bar. Reconsideration Decision at 1. The court rejected the proposed amendment as "futile." *Id.* at 2. It concluded that the proposed amendment would not affect its conclusion as to the applicability of Section 207. *Id.*

Second, Beehive moved to "amend, or provide relief from, order of dismissal," which the Court concluded was equivalent to a motion for reconsideration. *Id.* at 1, 3. In that motion,

Beehive did not point to any changed circumstances that would justify reconsideration, but instead made a number of arguments as to why it believed that the Court's dismissal decision was wrong. The Court denied Beehive's motion. It explained that "[r]econsideration 'is not appropriate to revisit issues already addressed or advance arguments that could have been raised prior to briefing.'" *Id.* (quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 1981)). The Court concluded that Beehive's asserted grounds for reconsideration "relate to issues already addressed by the court and/or contain arguments that should have been raised prior to the court's October 13 order." *Id.* at 3. The Court also denied Beehive's request to refer to the FCC a question Beehive believed was relevant to the dismissal decision.

In that same Reconsideration Decision, the Court denied Beehive's request "to direct final entry of a final judgment" on Beehive's claim in order to permit immediate appeal. *Id.* at 4. It did so because "Beehive has not provided support for a finding that there is no just reason for delay until the court has conclusively ruled on all claims" in the case. *Id.* at 5. Beehive retains the right to appeal the dismissal decision at the end of the initial *Beehive-Sprint* case (No. 08-380).

Soon after this decision, Beehive filed the complaint at issue here. Beehive filed its Complaint on January 25, 2010, but waited to serve the complaint until May 24, 2010. It did not designate this new Complaint as a related case to the ongoing No. 08-380 case. In addition Beehive took action at the FCC. Rather than filing a formal complaint against Sprint, however, Beehive filed a petition (and later amended petition) that, in essence, asked the FCC to declare that the Court got it wrong. *See* Petition for Declaratory Ruling, *In re Beehive Tel. Co.*, No. WC

10-36 (FCC), a copy of which is attached hereto as Exhibit B ("Beehive FCC Petition").[1] The FCC has not acted on Beehive's petition or its amended petition. But Sprint has had to spend resources responding to both of Beehive's petitions.

Beehive's new court Complaint is another attempt to resurrect its claims. The only substantial difference between Beehive's new Complaint and its prior complaint is that the new Complaint includes only part of the time period encompassed in the original complaint. The claim in the original complaint encompassed the period from when Sprint first began withholding payment on billed charges, namely October 1, 2007, all the way through time of final adjudication. The claim in the new Complaint includes only the period from April 1, 2008 onward. In the new Complaint, Beehive provides a single justification as to why the Court's prior dismissal decision was ostensibly inapposite: "the bar of Section 207 only can apply to charges which had accrued and for which Beehive had billed up to and including the date of Beehive's informal complaint to the FCC, which date, as noted above, was March 21, 2008."

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[1] In its Petition, Beehive stated that its goal was for "the Commission to terminate a controversy that arises from the order of the United States District Court . . . dismissing Beehive's collection suit against Sprint. . . ." Beehive FCC Petition at iii. Of course, the controversy Beehive had in mind was that it had lost.

In its Petition, Beehive repeated many of the arguments that it had already made to the Court, that the Court had already found either irrelevant or wrong. For example, Beehive argued that Section 207 was not applicable to its court action because Beehive's FCC and court actions sought different remedies (*id.* at 18-20), and because Beehive's FCC action was based on self-help while its court action was based on its tariff (*id.* at 21-23). As it had in court, Beehive argued that the FCC lacks jurisdiction over collection actions and that this somehow implicates whether the Court's decision was correct, the very issue this Court had refused to refer because it was extraneous. Compare *id.* at 12-16 *with* Reconsideration Order at 4. Beehive hoped that its process of self-referral of these issues to the FCC would lead to a favorable decision that would then "afford Beehive the opportunity to make its case before the Court." Beehive FCC Petition at 24.

Jan. 25, 2010 Complaint (Doc. #1) at 5. As set forth below, that justification fails as a matter of law.

**ARGUMENT**

Beehive's new Complaint should be dismissed for lack of subject matter jurisdiction. The Court already concluded that Beehive's former complaint should be dismissed for this same reason, because Section 207 of the Communications Act barred Beehive from suing in court on an issue on which it had already brought a complaint to the FCC. Basic principles of collateral estoppel (issue preclusion) require the same result here. Beehive cannot pursue its claim in the same judicial forum that the Court already determined was unavailable to it.

Issue preclusion applies when the party to be estopped was a party to or assumed control of the prior litigation, the issues presented are in substance the same as those resolved in the earlier litigation, the controlling facts or legal principles have not changed significantly since the earlier judgment, and no other special circumstances exist to warrant an exception to the normal rules of preclusion. *Klein v .C.I.R.*, 880 F.2d 260, 262-63 (1989). Here, the parties are the same. The issue is also the same. In its prior dismissal decision, the Court evaluated whether, under Section 207, Beehive's FCC complaint precluded its subsequent court complaint. The Court concluded that it did because both concerned "Sprint's refusal to pay access service charges," for a certain type of call traffic. Dismissal Order at 4. That is equally true of Beehive's new complaint.

In its new Complaint, Beehive asserts that Section 207 cannot apply to the period after March 21, 2008 when it filed its FCC complaint. But that is simply a new argument that the Court was wrong, an argument that Beehive chose not to make to support its prior complaint.

That argument is too late. The issue of whether Section 207 applies to the period after March 21, 2008 has already been resolved against Beehive.

The Court dismissed Beehive's prior complaint as a whole, a complaint that encompassed charges billed after March 21, 2008. In the dismissed complaint, Beehive sought "an amount no less than $929,626.31" allegedly to compensate it for the amount that had accrued as of the time of its complaint. Complaint, No. 08-380 (Doc. #1) at 5. But Beehive's complaint was filed on May 31, 2008 well after March 21. And the complaint specified that the $929,626.31 amount was what Beehive had billed Sprint through *May 1, 2008*, combined with late charges. *Id.* ¶¶ 14-15. For that reason alone, the amount Beehive specified in its prior complaint plainly encompassed charges billed after March 21, 2008.

But that is just the start of the post-March 21 damages that Beehive sought. Beehive's complaint also sought "***such ongoing amounts that may come due for services received by Sprint pursuant to NECA 5 from and after the date this action is filed.***" *Id.* at 5 (emphasis added). Thus, when Beehive sought partial summary judgment in June 2009, it did so with respect to the amount that had accrued up until the time of its filing, 13 months after March 2008. *See* Beehive Mem. in Support of Motion for Partial Summary Judgment (Doc. #22), Ex. 1 at 2 (citing amounts accrued up to June 2009). And if Beehive's initial complaint were reinstated on appeal, it would encompass amounts that accrued after June 2009 as well. As a result, there can be no dispute that the Court's decision dismissing Beehive's claim applied to charges Beehive billed after March 2008 and thus decided the question of whether Section 207 applies to post-March 2008 amounts.

Beehive apparently believes that, because it has excised the period through March 2008 from its new Complaint, its new Complaint raises a different issue than its prior complaint. But excising the period through March 2008 simply has no relevance to whether Beehive's claim for the subsequent time period is barred by Section 207. If, after the Court had dismissed its claim, Beehive had sought leave to amend it to excise the period through March 2008, the Court would have dismissed that motion as futile, just as it dismissed Beehive's motion for leave to amend the jurisdictional basis asserted.

Beehive may further believe that it is justified in re-filing its complaint for post-March 2008 telephone traffic because the Court dismissed its earlier action without prejudice. That is to misunderstand the purpose of the dismissal without prejudice. The Court dismissed Beehive's complaint without prejudice to enable Beehive to file a formal complaint at the FCC, not to enable it to re-file in court. Its conclusion that Beehive could not pursue its claim in court continues to bind Beehive. As the First Circuit has explained, "[t]he usual meaning of the phrase 'without prejudice' is 'without prejudice as to the substantive cause of action. . . [but] with prejudice on the issue. . . 'which was litigated in the prior action.'" *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (quoting Restatement of Judgments § 49, comment b, at 195 (1942)). For that reason, the Tenth Circuit has concluded that a dismissal decision is a judgment on the merits that prevents relitigation of issues already litigated. *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001); *see also Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1215 (10th Cir. 2003) (Hartz, J., concurring) (noting that a dismissal without prejudice precludes relitigation of the same issue at least in the absence of new facts or law). The Court's decision dismissing Beehive's complaint for lack of

subject matter jurisdiction was a decision on the merits of that question. Thus, in *Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F.2d 240 (10th Cir. 1979), the Tenth Circuit held that a party could not pursue a second complaint in the same forum that had dismissed its first suit for lack of subject matter jurisdiction even though, in that case, there had been an intervening legal decision changing the law.

The Court's prior decision was also a "final" decision in the sense required for collateral estoppel even though other parts of the case continue. Final in the "collateral estoppel sense is not identical to 'final' in the rule governing the jurisdiction of appellate courts." *Sherman v. Jacobson*, 247 F. Supp. 261, 268 (S.D.N.Y. 1965). As Judge Friendly explained for the Second Circuit in *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 87-90 (2d Cir. 1961), "'finality' in the context [of issue preclusion] may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *See also Metromedia Co. v. Fugazy*, 983 F.2d 350, 366 (2nd Cir. 1992) (explaining that whether a decision should be considered final for collateral estoppel purposes, turns on factors such as whether decision was avowedly tentative, the adequacy of the hearing and the opportunity to appeal); Restatement (Second) of Judgments § 13 (1982) ("final judgment for purpose of collateral estoppel 'includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.'"). Thus, in *Sherman*, the court found there was no reason to permit the defendant to re-litigate an issue on which he had already had his day in court. 247 F. Supp. at 268.

Here, there is no reason to permit Beehive to re-file its (slightly amended) Complaint in the forum the Court already determined was not available to it. Courts have consistently applied

collateral estoppel to preclude re-filing in a forum already found inappropriate.[2] Where, as here a court has determined that a plaintiff had to pursue its claims at an administrative agency, subsequent efforts to return to court have been precluded. In *Segal v. Western States Telephone Co. Inc.*, 606 F.2d 842 (9th Cir. 1979), the Ninth Circuit found that where a plaintiff's complaint had been dismissed under the doctrine of primary jurisdiction to be pursued at an agency, and the agency had not yet ruled, the plaintiff could not bring the same substantive issues from the original complaint back to court. Similarly, in *Solar v. Merit Systems Protection Board*, 600 F. Supp. 535 (S.D. Fla. 1984), the court found that that the plaintiff was precluded from pursuing a second action where his first action had been dismissed for failure to exhaust administrative remedies and the plaintiff had not taken the steps to exhaust those remedies.

Beehive already had a full and fair opportunity to litigate whether it could proceed on its claims in court. The Court carefully considered Beehive's opposition to Sprint's motion to dismiss and two subsequent attempts to resurrect its court action. Beehive has also made additional efforts to somehow reverse the Court's decision through the Petition and Amended Petition it filed at the FCC. And Beehive will still have an opportunity to appeal the Court's decision at the end of the original case.[3]

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[2] *See Matosantos*, 245 F.3d at 1209 (holding that plaintiff could not re-file in same forum after complaint was dismissed for lack of personal jurisdiction); *Offshore Sportswear Inc. v. Vuarnet International BV*, 114 F.3d 848 (9th Cir. 1997) (holding plaintiff could not make new filing in the same forum even if based on a different time period than prior filing where court had previously dismissed based on forum selection clause); *cf. Birgel v. Board of Commissioners*, 125 F.3d 948 (6th Cir. 1997) (despite voluntary dismissal, plaintiff could not re-file based on theory of recovery previously found to be barred).

[3] *See Sherman*, 247 F. Supp. at 268 (holding that the defendant had not yet had an opportunity to appeal did not matter as "this opportunity will one day materialize."). The possibility of a Tenth Circuit appeal that could either affirm or reverse this Court's prior decision underscores the difficulties that could be caused by permitting Beehive to pursue in a second action claims it can

Beehive is not entitled to still another bite at the apple. Enough is enough. As noted above, if Beehive had sought leave to amend its prior complaint by excising the period through March 2008, the Court would surely have rejected that proposed amendment as futile. And if Beehive had included in its motion for reconsideration the argument that the post-March 2008 time period is somehow different, that argument surely would have been rejected as too late since Beehive did not make it in responding to Sprint's motion to dismiss, just as the Court rejected other arguments on that basis. If such a change and argument, made shortly after dismissal, would not have permitted Beehive to proceed on its original claim, Beehive surely cannot proceed on a claim predicated on this same change and new argument – but made far later. Beehive did not deem its argument about the post-March 21, 2008 time period worthy to include in responding to Sprint's motion to dismiss – *or even in Beehive's motion to amend, or in its motion to reconsider.* Beehive cannot make this argument for the first time in a "new" complaint served seven months after dismissal.

This is already the fifth time that Sprint has had to defend the Court's dismissal decision (once in opposing the motion for leave to amend, once in opposing the motion to reconsider, once in opposing Beehive's FCC petition, and once in opposing Beehive's amended FCC petition). If Beehive wants to continue to pursue its claims, it should take the route the Court said was available to it and file a formal complaint at the FCC. Or it should wait until the end of the case it initially filed and then appeal the dismissal decision. It is not entitled to re-file its complaint each time its claim is dismissed in the hope that at some point it will come up with an argument that will lead to a different result. After briefing and argument, and consideration of a

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still appeal in a first action. *See Hung Duc Bui v. IBP, Inc.*, 205 F. Supp. 2d 1181 (D. Kan. 2002).

motion to reconsider, the Court reached the firm conclusion that Beehive's complaint should be dismissed. That decision controls the result here.

DATED this 15th day of June, 2010

PARR BROWN GEE & LOVELESS

/s/ Daniel E. Barnett
Paul C. Drecksel
Daniel E. Barnett

JENNER & BLOCK LLP
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Duane C. Pozza (*pro hac vice* to be filed)

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